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No. 89-372

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1989

AMANDA ACQUISITION CORPORATION,

Petitioner,

vs.

UNIVERSAL FOODS CORPORATION, ALAN R. ANDERSON, MICHAEL E. BATTEN, DR. OLAN D. FORKER, DR. CAROL I. WASLIEN GHAZAII, LEON T. KENDALL, PAUL L. KOHNSTAMM, CHARLES S. McNEER, ORVILLE R. MERTZ, JOHN L. MURRAY, DR. BERNARD S. SCHWEIGERT, GUY A. OSBORN, GERARD E. VENEMAN, and DARRELL E. WILDE,

Respondents.

On Petition For A Writ of Certiorari To The United States Court of Appeals For The Seventh Circuit

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RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

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1. Whether petitioner has rendered this case moot by reason of its voluntary termination of its tender offer?

2. Whether the decision of the Court of Appeals below, which upheld the constitutionality of the Wisconsin Business Combination Act, is consistent with this Court's decision in *CTS v. Dynamics Corp. of America*, 481 U.S. 69 (1987)?

RULE 28.1 LISTING

Respondent Universal Foods Corporation has no parent companies, no domestic subsidiaries other than wholly-owned subsidiaries and no foreign subsidiaries whose stock is publicly traded.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit, reported at 877 F.2d 496, is set forth in the appendix to the petition beginning on page A-17. The decision and order of the district court, reported at 709 F. Supp. 984, are set forth in the appendix beginning on page A-42.

JURISDICTION

Respondents believe that the petition, filed August 28, 1989, is untimely pursuant to Supreme Court Rule 20.4 and 28 U.S.C. § 2101(c). The Court of Appeals rendered judgment in this matter on May 24, 1989 and mailed the judgment to the parties on that date. There was no other mailing by the Court of Appeals under Fed. R. App. P. 36. The judgment, which provides among other things that the judgment of the District Court is affirmed "in accordance with the order of this Court *entered this date*" (emphasis added), bears the date May 24, 1989, and no other date.[1] If May 24, 1989 is the operative date, the petition, filed ninety-six days thereafter, is untimely.

[1]The petition is entirely misleading in this regard. The copy of the judgment of the Court of Appeals which Amanda reprinted in its appendix is *not* the formal judgment mailed to the parties by the Court of Appeals in accordance with Fed. R. App. P. 36. The formal judgment mailed by the Court of Appeals bears the date May 24, 1989, and does *not* contain the words "Entered on AIMS May 30 1989" which petitioner has inserted in the form of the judgment included in its appendix. (A-114.) Long after the Court of Appeals mailed the formal judgment, Amanda apparently independently obtained an internal Seventh Circuit copy of the judgment which bore a stamp off to the side of the document containing the words Amanda now has inserted into the text of the judgment reprinted in its appendix. Respondents have reprinted in their appendix to this brief the only judgment mailed to the parties by the Court of Appeals. (Res. App. 1).

By letter of August 30, 1989, the Clerk of the Court of Appeals informed this Court that personnel of the Court of Appeals did not enter a computer record of the judgment into the Court's "appellate information management system" until May 30, 1989. If that is the date on which judgment was entered, the petition is timely.

Respondents also believe that the petition presents no Article III case or controversy because the issues raised by the petition have been rendered moot by petitioner's voluntary abandonment of its tender offer. *See* Res. App. 2; pp. 6-8, *infra*.

COUNTERSTATEMENT OF THE CASE

A. *Mootness*

On December 2, 1988, petitioner Amanda Acquisition Corporation commenced a highly-leveraged, highly-conditional hostile tender offer for respondent Universal Foods Corporation, a Wisconsin corporation. Among a host of conditions Amanda imposed in the offer was one requiring a final judicial declaration that the Wisconsin Business Combination Act, Wis. Stat. § 180.726 ("Wisconsin BCA"), is unconstitutional or a determination that the Act is otherwise inapplicable to Amanda's hostile offer. After a preliminary hearing, the district court held that the Wisconsin BCA is constitutional. On May 24, 1989, the Seventh Circuit affirmed that decision.

Amanda filed its petition with this Court on August 28, 1989. Fourteen days later, however, Amanda terminated the tender offer and abandoned its effort to acquire Universal. *See* Res. App. 2. As a consequence of Amanda's decision to abandon the tender offer, respondents submit that this case is moot.

B. *The Wisconsin BCA*

The Wisconsin BCA restricts the extent to which a Wisconsin corporation may effect certain defined "business combinations" with

an "interested stockholder" (one acquiring ten percent or more of a corporation's voting stock) after the stockholder acquires its dominant position (without the advance approval of the board of directors). Wis. Stat. § 180.726(2). *See also* Wis. Stat. §§ 180.726(1)(j),(n). The Act is limited both in scope and duration. First, the Act limits the definition of "business combinations" to those mergers and equivalent transactions which involve self-dealing between the corporation and the dominant stockholder. *See* § 180.726(1)(e). Second, the restrictions imposed by the Act also are only of a three-year duration, after which the dominant shareholder may engage in a business combination upon approval of the remaining shareholders or the payment of a defined fair price. § 180.726(3). Finally, the Wisconsin legislature limited the application of the Act to corporations chartered in Wisconsin, and, of those, only ones which have other significant connections to the State. § 180.726(1)(L)1.a-d.

Petitioner's mischaracterizations of the Wisconsin BCA make it equally important to describe what the Act does not do. First, the Act in no way purports to regulate tender offers or tender offerors; nothing in the Act prevents, limits, delays or otherwise regulates tender offers — their terms, timing or disclosures — in any respect. The Act in fact has nothing to do with when and under what circumstances a bidder can make a tender offer to shareholders of Wisconsin corporations. Second, the Act does not prevent a change of control in a Wisconsin corporation,[2] nor does it in any way regulate or restrict the transfer of shares in the tender offer context. The Act likewise does not impair a tender offeror's voting rights; nothing in the Act interferes with the ability of a bidder to purchase a controlling interest in a Wisconsin corporation or to exercise that control. Moreover, the Wisconsin BCA does not restrict a tender offeror's ability to communicate with shareholders in a proxy contest or otherwise, or grant advantages to target management in doing so.

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[2]The very statistics cited by petitioner confirm this fact. Despite petitioner's assertions throughout its petition that business combination acts "are effective in squelching offers" (p. 11), a closer look at the 64 hostile tender offers cited by petitioner for shares of corporations chartered in states with such statutes reveals that at least 43 resulted in a sale of the target, including at least 22 which resulted in a sale of the target to the hostile bidder.

The limited restrictions of the Act do not apply to all business combinations. Recognizing that all such transactions are not necessarily detrimental to shareholders and other affected corporate constituencies, the Wisconsin Legislature left it to the elected representatives of the shareholders, the board of directors, to evaluate proposed control transactions and exempt those beneficial to the corporation and its shareholders. By withholding their approval for particular transactions, however, the board *cannot* prevent a tender offer from proceeding, delay the closing of the offer or prevent the successful tender offeror from exercising full control (other than with respect to defined self-dealing transactions).

C. ***The Decisions Below***

The uncontroverted findings of the courts below confirm the limited focus of the Wisconsin BCA. The District Court specifically observed that the Wisconsin Act "does not directly impede a tender offer in any respect" nor does it "prevent a tender offer from going forward." (A-68.) *See also* A-69 ("[n]othing about the Act prohibits any entity from purchasing or offering to purchase shares in Wisconsin corporations, or from attempting thereby to gain control"). Similarly, the Court recognized that "[t]he Act can not reasonably be said to impair shareholder decision-making in the tender offer process." (A-71.) Contrary to petitioner's assertions, the District Court also found that the Act's claimed deterrent effect on tender offers was "speculative" (A-69) and "uncertain." (A-79.) Following an exhaustive analysis of the provisions and purposes of the Williams Act as explained by this Court in *CTS v. Dynamics Corp. of America*, the District Court concluded that the Wisconsin BCA's regulation of the substantive internal affairs of Wisconsin corporations does not frustrate any purpose of the Williams Act. (A-76.) The District Court similarly concluded that the Act's nondiscriminatory regulation of Wisconsin corporations only in the furtherance of legitimate state interests does not contravene the Commerce Clause. (A-81.)

The Seventh Circuit affirmed the District Court in both respects. The Court, in an opinion by Judge Easterbrook, initially noted its strong disagreement with the economic principles relied upon by the

Wisconsin Legislature in enacting the Business Combination Act. (A-23-24.) Nevertheless, the Court held that the preemption analysis clearly defined by this Court in *CTS v. Dynamics Corp. of America* compelled the conclusion that the Act does not frustrate any purpose of the Williams Act. Like the District Court, the Seventh Circuit recognized that the Wisconsin Act's regulation of the internal affairs of state corporations does not prevent, delay or otherwise regulate tender offers or the tender offer process. The Court observed that the Wisconsin BCA does not "alter any of the procedures governed by federal regulation" (A-32) and that the Act leaves bidders "free to acquire shares of Wisconsin firms on schedule." (A-31.)

Relying on *CTS*, the Seventh Circuit held that nothing in the Williams Act indicates an intent to preempt such state regulation of the internal affairs of domestic corporations. (A-29.) Indeed, the Court found that the Wisconsin BCA is conceptually indistinguishable from the statute this Court upheld in *CTS*, and from other rules, such as cumulative voting, governing the internal affairs of corporations. (A-30, 31.) "If [such statutes] are not preempted," the Court observed, "neither is Wis. Stat. § 180.726." (A-31.) Noting finally that "the Williams Act does not create a right to profit from the business of making tender offers," the Seventh Circuit concluded that under *CTS* the Wisconsin BCA is not preempted by the Williams Act. (A-33.)

The Court of Appeals found that *CTS* likewise controlled petitioner's Commerce Clause challenge to the Wisconsin BCA. In accord with *CTS*, the Court found that the Wisconsin BCA does not discriminate against interstate commerce nor subject interstate activities to a risk of inconsistent regulation. (A-34-36, 37.) In addition, the Seventh Circuit recognized that the Wisconsin BCA does not directly regulate interstate commerce in any respect: "Buyers of stock in Wisconsin firms may exercise full rights as investors, taking immediate control. No interstate transaction is regulated or forbidden." (A-35.) These matters resolved, the Seventh Circuit concluded that this Court's clear holding in *CTS* dictated a simple, straightforward result: Since the Wisconsin BCA evenhandedly regulates only the internal affairs of corporations created under Wisconsin law, the Act does not violate the Commerce Clause, even if it may make some Wisconsin corporations less attractive takeover targets. (A-40, 41.)

REASONS FOR DENYING THE WRIT

I. THE ISSUES RAISED BY THE PETITION ARE MOOT.

This case is moot. "[W]hen the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome," *United States Parole Commission v. Geraghty*, 445 U.S. 388, 396 (1980), *quoting Powell v. McCormack*, 395 U.S. 486, 496 (1969), there no longer exists a case or controversy for review by this Court. Petitioner commenced this litigation and ultimately sought review by this Court in order to facilitate its tender offer for Universal. That tender offer no longer exists; two weeks after filing its petition, Amanda terminated its tender offer for Universal, "instructed the depositary for its offer to return all shares tendered to [it] and not previously withdrawn" (Res. App. 2) and withdrew its offer to acquire Universal by merger. This case accordingly is moot because "no decision . . . by this Court can now have an effect" on petitioner's now-abandoned transaction. *Tiverton Board of License Commissioners v. Pastore*, 469 U.S. 238, 239 (1985) *(per curiam)*.

Edgar v. MITE Corp., 457 U.S. 624 (1982), does not alter this conclusion. Although MITE had withdrawn its offer before review by this Court, it retained a significant interest in the controversy because it remained "expose[d] . . . to civil and criminal liability for making the . . . offer in violation of the Illinois Act." *Id.* at 630 (plurality opinion). Here, petitioner faces no potential civil or criminal liability, nor any other "collateral consequences" on matters relating to the judgment at issue.[3]

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[3]The mere fact that Amanda has spent money on its former offer (money Amanda cannot recover regardless of any action by this Court) does not keep alive a controversy that has now ended.

Similarly, the circumstances in *CTS Corp. v. Dynamics Corp. of America*, 481 U.S. 69 (1987), only underscore the mootness of the instant case. The statute at issue in *CTS* affected the voting rights of the CTS stock acquired by Dynamics. The Court held that even though the parties had settled several disputes regarding a tender offer, the case was not moot because the judgment of this Court would still affect the voting rights of Dynamic's shares. 481 U.S. at 78 n. 5. The operation of the Wisconsin BCA in no way restricts Amanda's rights as a shareholder (if it remains a shareholder) or otherwise has any continuing harmful effects on Amanda.

Apparently anticipating that its offer would be withdrawn not long after the filing of the petition and that it would face a mootness challenge, petitioner included in its petition (pp. 10-11) a section entitled "constant repetition consistently evading review." These arguments are wholly unpersuasive. The "capable of repetition" exception applies *only* where "(1) the challenged action was in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there was a reasonable expectation that the same complaining party would be subjected to the same action again." *Weinstein v. Bradford*, 423 U.S. 147, 149 (1975). This case fails both tests. First, there is no time limitation inherent in tender offer activity which prevents full litigation of constitutional issues during the pendency of an offer. Tender offers frequently reach the appellate stage, as demonstrated by this Court's decision in *CTS*, this very case (prior to petitioner's abandonment of its offer), and numerous decisions of other courts of appeals, including those cited in the petition. *See, e.g., Polaroid Corp. v. Disney*, 862 F.2d 987 (3d Cir. 1988); *Tyson Foods, Inc. v. McReynolds*, 865 F.2d 99 (6th Cir. 1989); *Hyde Park Partners, L.P. v. Connolly*, 839 F.2d 837 (1st Cir. 1988).

Second, Amanda can point to no "reasonable expectation" or "demonstrated probability" that it will ever be subject to the provisions of the Wisconsin BCA. *See Weinstein v. Bradford*, 423 U.S. 147, 149 (1975) *(per curiam)*. A mere "theoretical possibility" that Amanda may make a new offer or that some other controversy will develop in the future involving the Wisconsin BCA is insufficient to revive this case. *See Murphy v. Hunt*, 455 U.S. 478, 482 (1982) *(per curi-*

am). This case is moot. The petition should be denied, without vacating the decisions below.[4]

II. THE DECISION OF THE COURT OF APPEALS UPHOLDING THE WISCONSIN BCA MERELY APPLIES THE ANALYSIS OF THIS COURT IN *CTS* AND PRESENTS NO IMPORTANT ISSUES FOR REVIEW.

In *CTS v. Dynamics Corp. of America*, 481 U.S. 69 (1987), this Court set forth clear and definitive principles to govern Supremacy and Commerce Clause challenges to state regulation of the internal affairs of domestic corporations. The Seventh Circuit below concluded that these principles clearly outlined in *CTS* compel the conclusion that the Wisconsin BCA is constitutional. That decision is the first, and to this point the only, court of appeals decision which addresses a claim that a state business combinations act which applies only to domestic corporations is preempted by the Williams Act or violates the Commerce Clause. There is no conflict among the circuits on these issues. Since the Seventh Circuit simply followed *CTS*, this case raises no new, interesting or important legal issues for review by this Court, and no sound reason to revisit issues definitively resolved only two years ago.

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[4]Because this case has become moot through the petitioner's own voluntary acts, this Court should not vacate the judgment below pursuant to the *Munsingwear* mootness rule. Because "those *who have been prevented* from obtaining the review to which they are entitled should not be treated as if there had been a review," the *Munsingwear* rule protects parties from the *res judicata* effects of judgments, "review of which was prevented through *happenstance*." *United States v. Munsingwear, Inc.*, 340 U.S. 36, 39-41 (1950) (emphasis added). The rationale for this rule obviously does not apply where a party has mooted the controversy through its own voluntary acts. Otherwise, disappointed litigants could have adverse judgments vacated simply by announcing that they had terminated the conduct at issue (thereby obtaining in many cases in substance what was sought from the Court in the first instance). *Cf. City of Mesquite v. Aladdin's Castle*, 455 U.S. 283, 288-89 (1982). Such a result would be particularly inappropriate here, for an order vacating the lower courts' judgments would leave Amanda (technically) free to reinstitute litigation in the same courts, making arguments fully argued, fully litigated and fully resolved in this litigation. This Court should accordingly simply deny the petition for certiorari.

A. The Court Below Merely Applied The Analysis Of This Court in *CTS* In Concluding That The Wisconsin BCA Is Not Preempted By The Williams Act.

The Court of Appeals correctly acknowledged at the outset that preemption analysis begins with the presumption that Congress does not intend to preempt state action, particularly "state law in areas traditionally regulated by the States." *See* A-28, *quoting California v. ARC America Corp.*, _____ U.S. _____, 109 S. Ct. 1661, 1665 (1989). *See also Hillsborough County v. Automated Medical Laboratories, Inc.*, 471 U.S. 707, 716 (1985). This Court in *CTS* made it clear that there is perhaps no area of regulation more traditionally reserved to state governments than the regulation of the internal affairs of domestic corporations. *See* 481 U.S. at 89-91. The Securities Exchange Act (which the Williams Act amended) itself sets forth an unequivocal Congressional intent to *preserve* state laws which do not "conflict with the provisions of this chapter or the rules and regulations thereunder . . ." 15 U.S.C. § 78bb(a) (1988). *See also CTS*, 481 U.S. at 96 (Scalia, J., concurring) ("Unless it serves no function, [§ 28(a)] forecloses preemption on the basis of conflicting 'purpose' as opposed to conflicting 'provision.' ").

The Seventh Circuit recognized that the Wisconsin BCA does not conflict with the provisions or policies of the Williams Act. The Seventh Circuit observed, as has this Court, that "[t]he Williams Act regulates the *process* of tender offers: timing, disclosure, proration . . ., best-price rules." (A-30) (emphasis by the Court). *See also CTS*, 481 U.S. at 79-80 (summarizing "the structure and purposes of the Williams Act"); *Schreiber v. Burlington Northern, Inc.*, 472 U.S. 1, 8-11 (1985). The Wisconsin BCA, in contrast, regulates only the internal affairs of corporations domiciled in Wisconsin; "it does not . . . alter any of the procedures governed by federal regulation." (A-32.)[5] Like dozens of other state statutes regulating the internal affairs of domestic corporations, all the Wisconsin BCA does is define

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[5]Amanda also seems to suggest in the petition that the Wisconsin BCA somehow frustrates a 60-day tender offer period set forth by the Williams Act. Petition, 26-27. To the contrary, as the Seventh Circuit recognized, "[a]ny bidder complying with federal law is free to acquire shares of Wisconsin firms on schedule." (A-31).

corporate privileges *after* a successful tender offer.

The Seventh Circuit's conclusion that the Williams Act does not preempt such state regulation of internal corporate affairs follows directly from *CTS*. This Court in *CTS* expressly refused to read the Williams Act to preempt state laws which "may limit or delay the free exercise of power *after* a successful tender offer." 481 U.S. at 85 (emphasis added). *CTS* identified staggered directors' terms (which may delay control for up to three years in some states) and cumulative voting statutes as corporate governance laws of "unquestioned validity" even though they, like the Wisconsin BCA, may delay the exercise of complete control following a successful tender offer. *Id.* Judge Easterbrook expanded on these examples by identifying a number of other state statutes which would fall in that category — statutes authorizing charitable and mutual corporations, buy-sell agreements and non-voting stock — all of which would be preempted if the Williams Act were read as suggested by the plaintiff in *CTS*, and petitioner here. (A-30, 31.) Like this Court in *CTS*, the Seventh Circuit recognized that there is no principled distinction between those statutes of "unquestioned validity" — which "may make a transaction less attractive or impossible" (A-30) — and the Wisconsin BCA's short-term limitation on corporate privileges which were created by Wisconsin law in the first place.[6]

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[6]While the Seventh Circuit's opinion below is the only appellate court decision addressing the interaction of the Williams Act and a state business combination act, the opinions of the district courts in substance are in accord. In addition to the District Court opinion here, the court in *Vernitron Corp. v. Kollmorgen Corp.*, 89 Civ. 241 (JES.), trans. at 53 (S.D.N.Y. Feb. 9, 1989), rejected a tender offeror's substantive "neutrality" argument and concluded that New York's business combination act is fully consistent with Williams Act purposes. *See also Veere, Inc. v. Firestone Tire & Rubber Co.*, 685 F. Supp. 1027, 1030 (N.D. Ohio 1988) (recognizing that after *CTS* a majority of this Court rejects the "neutrality" interpretation of the Williams Act). No district court has ever permanently struck down a business combination act as frustrating any purpose of the Williams Act, although some have applied a "meaningful opportunity for success" standard in the analysis. *See, e.g., BNS, Inc. v. Koppers Co.*, 683 F. Supp 458, 469 (D. Del. 1988); *RP Acquisition Corp. v. Staley Continental, Inc.*, 686 F. Supp. 476, 482 (D. Del. 1988); *West Point-Pepperell, Inc. v. Farley, Inc.*, 711 F. Supp. 1096, 1102 (N.D. Ga. 1989). While not adopting the "meaningful opportunity for success" standard, the Seventh Circuit identified a variety of meaningful ways hostile tender offers may succeed notwithstanding the provisions of the Wisconsin BCA. (A-39, 40.)

The Court of Appeals likewise simply applied *CTS* in its rejection of the "neutrality" interpretation of the Williams Act. The Court below correctly observed that, beginning with *Piper v. Chris-Craft Industries, Inc.*, 430 U.S. 1 (1977), this Court has rejected the notion that there was a Congressional purpose in the Williams Act to ensure substantive "neutrality" between bidder and management in the tender offer context. Any Congressional "policy of evenhandedness does not go . . . to the purpose of the legislation," the *Piper* court emphasized; "[n]eutrality is, rather, but one characteristic of legislation directed toward a different purpose — the protection of investors." 430 U.S. at 29. *Cf. Schreiber v. Burlington Northern, Inc.*, 472 U.S. 1, 9 (1985). While three Justices of this Court suggested in *Edgar v. MITE Corp.*, 457 U.S. 624, 634-40 (1982), that there was such a policy of "neutrality" to be found in the Williams Act, in *CTS* only one Justice advanced that interpretation of the Act. 481 U.S. at 97-99 (White, J., dissenting). *See also* A-29 (noting this Court's "rough treatment" of the Seventh Circuit's favorable views of the "neutrality" interpretation in *CTS*). *CTS* thus compelled the lower court's conclusion that while Congress itself may have desired to remain neutral in regulating the procedural aspects of the tender offer process, "[n]othing in the Williams Act says that the federal compromise among bidders, targets' managers, and investors is the only permissible one." A-29, *citing CTS*, 481 U.S. at 78-87.[7]

The Seventh Circuit also correctly rejected petitioner's argument

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[7]This Court in fact upheld in *CTS* a statute far more onerous in its practical effect than the Wisconsin BCA. The Indiana Control Share Acquisition statute at issue in *CTS* could in certain circumstances deprive a tender offeror of all voting rights for shares acquired in a tender offer. Notwithstanding the lower court's conclusion that the Indiana statute was a "lethal dose" to prospective offers, *see Dynamics Corp. of America v. CTS Corp.*, 794 F.2d 250, 262-63 (7th Cir. 1986), this Court concluded that the Indiana statute did not frustrate any purpose of the Williams Act. 481 U.S. at 85-87. The Wisconsin BCA in contrast does not regulate the acquisition of control or otherwise affect a tender offeror's voting rights; rather, the Act simply delays the right to exercise the corporate privilege to merge parent and subsidiary — a privilege created by Wisconsin law in the first instance — a result *CTS* makes clear is consistent with the Williams Act. *See* 481 U.S. at 85-86.

that principles of "shareholder autonomy" (supposedly created by the Williams Act) invalidate statutes like the Wisconsin BCA: "Only if the Williams Act gives investors a right to be the beneficiary of offers could Wisconsin's law run afoul of the federal rule. No such entitlement can be mined out of the Williams Act, however." (A-32.) This conclusion, the Seventh Circuit recognized, follows directly from *Schreiber v. Burlington Northern, Inc.*, 472 U.S. 1 (1985), in which this Court specifically held that actions by a tender offeror and target management leading to the withdrawal of a tender offer "did not deprive investors of their due under the Williams Act." (A-32.)

In the end, therefore, the Seventh Circuit did no more than apply the preemption analysis developed by this Court in *CTS*. As was the case with the Indiana statute in *CTS*, "[t]he long standing prevalence of state regulation in this area suggests that, if Congress had intended to pre-empt" state regulation of the internal affairs of domestic corporations like the Wisconsin BCA "it would have said so explicitly." 481 U.S. at 86. Since Congress clearly did not do so, and since the Court of Appeals simply followed well-established precedent in upholding the Wisconsin BCA, the petition presents no new or important issues, and there is no reason for this Court to accept this case for review.

B. The Court of Appeals Merely Applied The Analysis Of This Court In *CTS* In Concluding That The Wisconsin BCA Does Not Contravene The Commerce Clause.

The central element of the Commerce Clause analysis in *CTS* is the principle that a state corporate law which applies only to domestic corporations, does not discriminate against interstate commerce and furthers legitimate state interests does not contravene the Commerce Clause. 481 U.S. at 87-94. The Court below, applying the uniform approach of the lower courts since *CTS*, upheld the Wisconsin BCA against petitioner's contention that the Act unreasonably burdens interstate commerce. Once again, there is no confusion in the lower courts on this score, no conflict among the circuits and, in light of the analysis outlined by *CTS* only two years ago, no important issue in need of review by this Court.

The straightforward Commerce Clause analysis set forth in *CTS* to govern the regulation of internal corporate affairs has generated no confusion, and certainly no conflict, in the lower courts. The lower courts have *uniformly* concluded that where business combinations acts, like the statute here, apply evenhandedly and only to domestic corporations, under *CTS* they do not run afoul of the Commerce Clause.[8] In contrast, where, as in *Edgar v. MITE Corp.*, 457 U.S. 624 (1982), a state statute purports to apply to corporations chartered elsewhere, the lower courts have found it unconstitutional under the Commerce Clause. *See, e.g., Tyson Foods, Inc. v. McReynolds*, 865 F.2d 99, 101-02 (6th Cir. 1989) (a case incorrectly cited by petitioner as evidence of a supposed conflict among the lower courts).

The Seventh Circuit's decision below (the first post-*CTS* appellate court decision in this context) falls directly in line with the analysis and holding of *CTS* as consistently interpreted by the lower courts. Because the Wisconsin BCA applies evenhandedly and only to domestic corporations, the Act plainly neither discriminates against interstate commerce nor poses a risk of subjecting tender offers to inconsistent regulation. (A-18-20, 21.) The Seventh Circuit also correctly recognized, directly contrary to petitioner's apparent assertion (pp. 16-17), that the Act in no respect regulates interstate commerce. (A-35) ("No interstate transaction is regulated or forbidden."). Finally, the Seventh Circuit did not disturb the District Court's uncontroverted finding that the Wisconsin BCA furthers the interests deemed constitutionally legitimate in *CTS*. (A-78, 79.) This conclusion, too, is in accord with the decisions of the lower courts addressing business combinations acts. *See BNS, Inc. v. Koppers Co.*, 683 F. Supp. at 473; *RP Acquisition Corp.*, 686 F. Supp. at 482; *West Point-Pepperell*, 711 F. Supp. at 1107.

The Court of Appeals also observed in accord with *CTS* that many

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[8] *See, e.g., Vernitron Corp. v. Kollmorgen Corp.*, 89 Civ. 241 (JES), slip op. at 54-56 (S.D.N.Y. Feb. 9, 1989); *West Point-Pepperell, Inc. v. Farley, Inc.*, 711 F. Supp 1096, 1108 (N.D. Ga. 1989); *RP Acquisition Corp. v. Staley Continental, Inc.*, 686 F. Supp. 476, 482 (D. Del. 1988); *BNS, Inc. v. Koppers Co.*, 683 F. Supp. 458, 473 (D. Del. 1988).

unquestionably valid state statutes have similar or more substantial effects on interstate commerce than the claimed effect of the Wisconsin BCA. (A-35.) This Court likewise found in *CTS* that numerous state laws which "prohibit[ ] certain transactions, and regulat[e] others . . . necessarily affect certain aspects of interstate commerce." 481 U.S. at 90. *CTS* in fact identified mergers, one of the precise subjects of the Wisconsin BCA, as a "typical example" of state regulations which affect interstate commerce but do not violate the Commerce Clause even though they may "make it more difficult for corporations to merge." *Id.* The Seventh Circuit applied this example by noting that this Court has long held that, as the merger privilege is granted by the state, withholding the privilege altogether does not violate the Commerce Clause. (A-35), *citing, inter alia, Louisville & Nashville R.R. v. Kentucky*, 161 U.S. 677, 701-04 (1896); *Kansas City, Memphis & Birmingham R.R. v. Stiles*, 242 U.S. 111, 117 (1916).

Petitioner nonetheless now attempts to create the illusion of error and conflict by suggesting that the Seventh Circuit improperly "rejected" some form of a constitutional balancing analysis. Petition, 20-22, *citing Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970). This assertion oversimplifies and distorts the Seventh Circuit's decision; what the Court below did was simply follow the Commerce Clause analysis dictated by *CTS*. In so doing, the Seventh Circuit declined to find that the constitutionality of the Wisconsin BCA turned on its view of the legislative wisdom of the Act, particularly since the Act regulates an area traditionally reserved to the States. (A-34, 38-39.) This approach is entirely consistent with *CTS* and a long line of like precedent of this Court. *See CTS*, 481 U.S. at 92 ("The Constitution does not require the States to subscribe to any particular economic theory. We are not inclined to 'second-guess the empirical judgments of lawmakers concerning the utility of legislation.' "), *quoting Kassell v. Consolidated Freightways Corp.*, 450 U.S. 662, 679 (1981) (Brennan, J., concurring). *See also Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 127-29 (1978).

The precise contours of any balancing analysis required by the Commerce Clause in the context of *other* state regulation in *other* areas of commerce may be the subject of debate in academe. This Court has recently made it clear that a balancing analysis may be

appropriate in other contexts. *See Northwest Central Pipeline Corp. v. State Corporation Commission of Kansas*, _____ U.S. _____, 109 S. Ct. 1262, 1282 (1989); *Healy v. Beer Institute, Inc.*, _____ U.S. _____, 109 S.Ct. 2491 (1989). *CTS* made equally clear, however, the appropriate analysis for nondiscriminatory state regulation of the internal affairs of domestic corporations, and there has since been no confusion or conflict in the lower courts in applying that analysis.[9]

Ultimately, the decision of the Court of Appeals upholding the Wisconsin BCA recognizes that the fundamental assertion of the petition (that the Wisconsin BCA unreasonably burdens interstate commerce) is premised on a notion this Court *squarely* rejected in *CTS*. In language that controls the outcome of this case as well, *CTS* made it clear that even if a state's exercise of its traditional authority to regulate the internal affairs of domestic corporations "limit[s] the number of successful tender offers . . . this result would not substantially affect our Commerce Clause analysis":

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[9]The petitioner's claimed conflict among the circuits regarding Commerce Clause balancing in the takeover context is illusory as well. Concededly, the Sixth Circuit applied a balancing analysis in striking down state takeover legislation, but the legislation there, like that in *Edgar v. MITE Corp.*, purported to apply to corporations chartered in *other* states. *See Tyson Foods, Inc. v. McReynolds*, 865 F.2d 99, 101-02 (6th Cir. 1989). *Hyde Park Partners, L.P. v. Connolly*, 839 F. 2d 837 (1st Cir. 1988), another supposed example of conflict according to the petition, in fact is fully in accord with the Seventh Circuit's decision below. The *Hyde Park* court affirmed that the deferential approach of *CTS* applies where, like the Wisconsin BCA, a state statute does not directly regulate interstate commerce but merely "define[s] the rights that are acquired by purchasing [domestic corporations'] shares." 839 F.2d at 845, *citing CTS*, 481 U.S. at 69. The *Hyde Park* court utilized a balancing analysis in that case because, in contrast to the Wisconsin BCA, the Massachusetts statute at issue there directly "prohibit[s]" or "condition[s]" the interstate sale of the shares *themselves*. 839 F.2d at 845. Since the Seventh Circuit, consistent with the other lower courts, directly applied the analysis defined by *CTS*, whether it may be appropriate to attach the purely formal label "balancing" to the *CTS* opinion, *see Country Classic Dairies v. Montana Department of Commerce Milk Control Bureau*, 847 F.2d 593, 595 (9th Cir. 1988), certainly does not alone create an important issue for review in this case.

> We reiterate that this Act does not prohibit any entity -- resident or nonresident — from offering to purchase, or from purchasing, shares in Indiana corporations, or from attempting thereby to gain control . . . We have rejected the "notion that the Commerce Clause protects the particular structure or methods of operation in a . . . market." *Exxon Corp. v. Governor of Maryland*, 437 U.S., at 127. The very commodity that is traded in the securities market is one whose characteristics are defined by state law. Similarly, the very commodity that is traded in the "market for corporate control" — the corporation — is one that owes its existence and attributes to state law. Indiana need not define these commodities as other States do; it need only provide that residents and nonresidents have equal access to them. This Indiana has done. Accordingly, even if the Act should decrease the number of successful tender offers for Indiana corporations, this would not offend the Commerce Clause.

481 U.S. at 93-94.

The Seventh Circuit's decision demonstrates that all of these observations apply fully to the Wisconsin BCA. This holding in *CTS* thus alone confirms that the decision below upholding the Wisconsin BCA in accordance with the uniform approach of the lower courts since *CTS* raises no important issues for review by this Court, and no reason to reexamine *CTS* only two years after it was decided.

CONCLUSION

For all of the foregoing reasons, respondents respectfully submit that the petition for a writ of certiorari should be denied.

Dated this 26th day of September, 1989.

Respectfully submitted,

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JUDGMENT — ORAL ARGUMENT

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

May 24, 1989

Before

Hon. William J. Bauer, Chief Judge
Hon. Frank H. Easterbrook, Circuit Judge
Hon. Hubert L. Will, Senior District Court Judge*

AMANDA ACQUISITION CORPORATION
Plaintiff-Appellant,
Cross-Appellee,

No. 89-1581 and 89-1712

vs.

UNIVERSAL FOODS CORPORATION, et al.,
Defendants-Appellees,
Cross-Appellants.

Appeals from the United States District Court for the Eastern District of Wisconsin
No. 88 C 1296
Judge Joseph P. Stadtmueller

This cause was heard on the record from the United States District Court for the Eastern District of Wisconsin, _____ Division, and was argued by counsel.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, AFFIRMED, in accordance with the order of this Court entered this date. Amanda Acquisition Corporation pays costs.

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*Hon. Hubert L. Will, Senior District Judge for the Northern District of Illinois, sitting by designation.

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NEWS

FOR IMMEDIATE RELEASE

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HIGH VOLTAGE ENGINEERING CORPORATION TERMINATES OFFER FOR UNIVERSAL FOODS CORPORATION

BOSTON, Mass., September 11, 1989 — High Voltage Engineering Corporation announced today that it has terminated its $38 per share cash tender offer for Universal Foods Corporation and its offer to the Board of Directors of Universal to acquire Universal for $42 per share in cash in a negotiated transaction. High Voltage has instructed the depositary for its offer to return all shares tendered to High Voltage and not previously withdrawn.

Clifford Press, Deputy Chairman of High Voltage, stated, "The Board's rejection of our proposals, and its refusal even to meet with us to discuss any questions they may have had, did not serve the interests of Universal's shareholders. We have determined at this time not to continue our tender offer and concluded that this tender offer cannot be consummated in light of the Wisconsin anti-takeover statute. Universal's Board of Directors has made a number of promises to its shareholders during the course of our offer, and now we and the other shareholders will see if they can follow through on those promises. We and the other shareholders will also look forward to the determination by the Supreme Court of the validity of Wisconsin's anti-takeover statute."

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[2205W.3]